No. 22-5884 & No. 22-5912

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHELSEY NELSON PHOTOGRAPHY LLC and CHELSEY NELSON,

Plaintiffs-Appellees and Cross-Appellants,

v.

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT and LOUISVILLE METRO HUMAN RELATIONS COMMISSION-ENFORCEMENT,

Defendants-Appellants and Cross-Appellees.

On Appeal from the United States District Court
for the Western District of Kentucky
Civil Case No. 3:19-cv-00851-BJB-CHL
Hon. Benjamin J. Beaton

APPELLEES'/CROSS-APPELLANTS' OPPOSITION TO HOLD BRIEFING IN ABEYANCE PENDING A RULING FROM THE U.S. SUPREME COURT IN *303 CREATIVE LLC v. ELENIS*

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Preliminary Statement

1. Appellees/Cross-Appellants Chelsey Nelson Photography LLC and Chelsey Nelson ("Nelson") create custom photographs and blogs celebrating marriage consistent with Nelson's religious beliefs. Opinion & Order ("Order"), R. 130, PageID.5356. Nelson desires to photograph, blog about, and participate in weddings consistent with her religious views on marriage, continue to follow a policy to that effect, and post a statement explaining her religious reasons for adopting this policy. *E.g.*, Pls.' Mot. for Summ. J. ("MSJ"), R. 92–1, PageID.2809–10.

2. But Louisville's public-accommodations law prohibits these activities. Order, R. 130, PageID.5359–60. The law requires Nelson to create photographs and blogs celebrating same-sex weddings, prohibits her from following her editorial policy, and bans her from publicly explaining this policy. *Id.* at PageID.5371–77, 5387–90. If she speaks consistent with her beliefs about marriage or declines to promote messages that violate those beliefs, Defendants-Appellants/Cross-Appellees ("Louisville") can fine her tens of thousands of dollars, force her to create artwork against her beliefs by court order, and impose other penalties as well. Pls.' Combined Response to Defs.' Cross-Mot. for Summ. J. and Reply, R. 104, PageID.4557 & n.8.

3. After learning about how Louisville's laws threatened her studio, Nelson filed this suit on November 19, 2019. She alleged that

Louisville's law violates her First Amendment and statutory rights to free speech, expressive association, and religious freedom. Compl., R. 1, PageID.42–50. She also alleged that one clause of the law—the Unwelcome Clause—facially violates the First and Fourteenth Amendments because it is vague, overbroad, and grants officials unbridled discretion. *Id.* at PageID.47–48. For these constitutional violations, Nelson sought injunctive and declaratory relief and damages. *Id.* at PageID.50–51.

4. The district court preliminarily enjoined Louisville from enforcing its law against Nelson. Prelim. Inj. Order, R. 47, PageID.1202. After discovery, the parties filed cross-motions for summary judgment. The district court then entered a permanent injunction and declaration after concluding that Louisville's law violated Nelson's rights under the First Amendment and Kentucky's Religious Freedom Restoration Act by compelling her to promote a view of marriage that conflicted with her faith and restricting her speech on that topic. Order, R. 130, PageID.5371–77, 5387–96. Louisville appealed. Notice of Appeal, R. 134.

5. Nelson cross-appealed several issues, including the dismissal of her damages claim and the refusal to facially enjoin or to declare facially unconstitutional the Unwelcome Clause. Notice of Cross-Appeal, R. 137.

Argument

6. Courts may stay proceedings, but should do so "carefully" because "a party has a right to a determination of its rights and liabilities without undue delay." *Ohio Env't Council v. U.S. Dist. Ct., S. Dist. of Ohio, E. Div.*, 565 F.2d 393, 396 (6th Cir. 1977). For this reason, the party seeking the stay has the burden to justify it. *Id.* That party must show "a pressing need for delay, and that neither the other party nor the public will suffer harm from entry of the order." *Id.*

7. Louisville identifies only one so-called "pressing need"—to avoid filing "supplemental briefing to adjust [the parties'] arguments" in light of *303 Creative LLC v. Elenis*. Appellants/Cross-Appellees' Mot. ("Mot.") 4.

8. But where "[j]urisdiction exist[s]," federal courts have a "virtually unflagging" duty to hear cases properly before them. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013); *accord Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (stays only rarely appropriate).

9. Consistent with that duty, courts have continued to adjudicate cases like Nelson's since the Supreme Court agreed to hear *303 Creative LLC v. Elenis*. *E.g.*, *Green v. Miss United States of Am., LLC*, __ F. 4th __, No. 21-35228, 2022 WL 16628387, *9–13 (9th Cir. 2022) (First Amendment protected beauty pageant against lawsuit under public-accommodations law); *Dep't of Fair Employment & Housing v. Cathy's Creations, Inc.*, No. BCV–18–102633, slip op. 17–22

(Cal. Sup. Ct. Oct. 21, 2022), *available at* https://bit.ly/3UJl2Dq (similar as to custom bakery); *New Hope Fam. Servs., Inc. v. Poole*, 5:18-CV-01419 (MAD/TWD), 2022 WL 4094540, at *4–5 (N.D.N.Y. Sept. 6, 2022) (First Amendment protected faith-based adoption agency against anti-discrimination regulation). The potential of filing a supplemental brief—if such a brief is even necessary here—is not a sufficiently "pressing need" to depart from this trend or the Court's normal course of business.

10. Conversely, Louisville's requested delay harms Nelson and the public. Nelson filed this lawsuit in November 2019. Compl., R. 1. Under Louisville's proposal, Louisville likely wouldn't even file its opening brief until July or August 2023. *See* Mot. at 3–4 (requesting 60 days from date of *303 Creative LLC v. Elenis* decision expected "in May or June 2023"). If neither party asks for additional extensions, briefing would be finished by October or November 2023 to accommodate the cross-appeal briefing schedule. 6 Cir. R. 28.1(f). On average, a decision would issue sometime in March or April 2024—about eight months after Louisville's opening brief. *See Federal Court Management Statistics* 15, *available at* https://bit.ly/3AbChos (last visited Nov. 21, 2022) (noting 8.5-month median time from notice of appeal to disposition). At that point, Nelson would've waited almost *four and a half years* for a final decision.

11. To be sure, Nelson benefits from the injunction. But not completely. She's cross-appealed the denial of her damages claims and the failure to enjoin the Unwelcome Clause. So delaying resolution of this case until at least the spring of 2024 would contradict 42 U.S.C. § 1983's purpose of "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

12. And the failure to enjoin the Unwelcome Clause as facially overbroad, vague, and giving unbridled discretion hurts Nelson and the public. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (explaining the danger of overbroad laws affecting speech "is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution"). Louisville has used the Unwelcome Clause to prosecute business owners for posting a sign that engaged in admittedly "political speech." Documents Supplementing MSJ, R. 129–1, PageID.5276. Louisville recognized the sign "was intended to be a political comment," but targeted the sign as "fighting words." *Id.* at PageID.5276–77. So the public and Nelson remain in doubt about what they can and cannot say in the city and therefore suffer harm every day they do not receive needed clarity.

13. Nelson respectfully proposes a better, more time-efficient approach. The parties should continue briefing as usual. Then, if this

Court has not yet decided this case when the Supreme Court decides *303 Creative LLC v. Elenis*, the parties could submit a supplemental brief within two weeks. Those briefs would address the effect, if any, of that decision. The expediency of that approach far outweighs any of Louisville's minor efficiency concerns.

14. Alternatively, Louisville requests a 30-day extension to file the First Brief. Mot. at 4. As a matter of professional courtesy, Nelson consents to that modest extension.

Conclusion

For these reasons, Appellees/Cross-Appellants ask the Court to deny Appellants/Cross-Appellees' motion to hold briefing in abeyance.

Dated: November 21, 2022

Respectfully submitted,

s/ John J. Bursch

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Certificate of Service

I hereby certify that on November 21, 2022, a copy of this response was filed electronically with the Clerk of the Sixth Circuit Court of Appeals. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

s/ John J. Bursch
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